United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-7003

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 77-7003

IRVING TRUST COMPANY,

Plaintiff-Appellee,

-against-

AMERICAN TRITICALE, INC., GREGORY SALI and DOROTHY W. SALI,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of New York

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BRIEF OF PLAINTIFF-APPELLEE, IRVING TRUST COMPANY

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BRIEF OF PLAINTIFF-APPELLEE IRVING TRUST COMPANY

Preliminary Statement

This is an appeal from an endorsed order, filed November 23, 1976, of the United States District Court for the Southern District of New York (Judge Dudley B. Bonsal) where the trial court denied appellants-defendants' motion to vacate a judgment filed September 8, 1975, holding:

> "Motion denied after argument.
> It is So Ordered
> November 22, 1976"

The judgment of the trial court was entered after appellants-defendants failed to appear for discovery pursuant to a conditional judgment order (FRCP 37) of the trial court entered pursuant to a stipulation between counsel for the respective parties. The conditional judgment order was obtained only after appellants-defendants had adjourned depositions scheduled pursuant to notice and stipulation again and again.

Question Presented

Was it an abuse of discretion for the trial court to deny a motion to vacate a judgment entered on non-compliance with the terms of a "so-ordered" stipulation of the parties? No.

Statement Of Facts

Since this appeal is being heard on the original record, references are to appellants-defendants' affidavit in support of the motion ["defendants' affidavit"], and appellee-plaintiff's affidavit in opposition ["plaintiff's affidavit"], together with the exhibits annexed thereto.

This action was originally instituted by appellee-plaintiff, a New York banking corporation, to collect three drafts totalling $450,000 (plus interest and attorneys' fees) from corporate appellant which had been accepted by appellee-plaintiff and were due and owing. The obligations of corporate appellant were personally guaranteed by the individual appellants. Plaintiff's affidavit Exhibit B.

Appellants-defendants' answer admitted the execution of the appropriate documentation, receipt of the loans, and that there had been no repayment of said loans. Plaintiff's affidavit Exhibit B.

By prior opinion (not on appeal before this Court) dated February 20, 1976, the trial court denied appellee-plaintiff's motion for summary judgment holding:

> "There is no dispute that the loans were made and not repaid, and that the Agreements and drafts were delivered by [appellants] defendants. However, [appellants] defendants

> counterclaim against [appellee] plaintiff and oppose [appellee] plaintiff's motion for summary judgment on the grounds that the loan is not now due, that the Agreements and drafts do not represent the parties' complete agreement, and that [appellee] plaintiff has breached the agreement alleged by [appellants] defendants, causing [appellants] defendants damages in the amount of $1,860,000." Plaintiff's affidavit Exhibit C.

Although the trial court denied appellee-plaintiff summary judgment, the opinion of the trial court recognized not only appellee-plaintiff's strong prima facie case, but the underlying need for expedition in these proceedings because appellee-plaintiff's primary hope for recovery rested upon its ability to recover the proceeds from the sale of grain owned by corporate appellant-defendant but pledged to appellee-plaintiff pursuant to the terms of the loan. The trial court's opinion concluded:

> "In light of the perishable nature of the security held by the appellee-plaintiff, to wit, grain represented by warehouse receipts, the parties should consider disposing of the security promptly in a commercially reasonable manner in order to maximize its value and placing the proceeds in a segregated interest bearing account for payment as later determined appropriate." Plaintiff's affidavit Exhibit C.

As fully set forth in the papers below, after appellee-plaintiff's motion for summary judgment, appellee-plaintiff first tried to consensually set a date for appellants-defendants' deposition, then noticed the deposition and then, from time to time, adjourned date of said deposition at appellants-defendants request. Plaintiff's affidavit ¶¶ 5 - 9.

After several adjourned dates, in frustration, appellee-plaintiff, by notice of motion dated June 21, 1976, applied for an order pursuant to FRCP 37 striking appellants-defendants' answer and counterclaim unless appellants-defendants appeared for deposition at a time, place and date fixed by the Court. Plaintiff's affidavit Exhibit G.

After consultation with appellants-defendants' attorneys, appellee-plaintiff and appellants-defendants stipulated to a form of conditional judgment order providing that:

> "Unless [appellants] defendants appear for deposition in the offices of Krause, Hirsch & Gross, 41 East 42nd Street, the attorneys for [appellee] plaintiff, at 10:30 A.M. on August 16, 1976 (or at such earlier time and at such other place to which the parties and their attorneys may stipulate), upon submission without further notice to [appellants] defendants, to this Court by the attorneys for [appellee] plaintiff of an affidavit of nonappearance, [appellants] defendants' answer and counterclaim shall be striken and judgment awarded to [appellee] plaintiff."

The date was selected for the sole and exclusive convenience of appellants-defendants. Appellants-defendants never advised appellee-plaintiff that there would be any difficulty in appearing as provided in the stipulation.

It should be noted from the inception of these proceeings appellants-defendants have been represented by the same counsel. Contrary to certain allegations in appellants-defendants' points, on the motion to vacate there were no allegations by appellants-defendants that they were not properly represented. Defendants' affidavit page 2.

Appellee-plaintiff would be substantially prejudiced by the vacating of the judgment and the reopening of these proceedings. Because of appellants-defendants admitted lack of assets, appellee-plaintiff's only present realistic hope of recovery on its claim is to realize the proceeds from the sale of grain once pledged as collateral. Such collateral is presently being liquidated in Boise, Idaho and Beaver County, Oklahoma. In its earlier order denying appellee-plaintiff summary judgment in this proceeding, the trial court recognized the perishable nature of the collateral evidenced by warehouse receipts held by appellee-plaintiff, and, in fact, recommended that such collateral be promptly sold in order to maximize its value. Notwithstanding numerous attempts by appellee-plaintiff to establish a

mutually agreeable procedure for the sale of such grain with appellants-defendants, appellants-defendants have resisted such sale and have failed to provide and willing and able purchaser. To extend these proceedings even further and fail to permit appellee-plaintiff to proceed expeditiously with the sale of remaining grain would make it virtually impossible for plaintiff to realize any substantial recovery on its claim in the foreseeable future. Plaintiff's affidavit ¶¶ 19 - 21, 26.

Furthermore, appellee-plaintiff has incurred inordinate legal fees and expenses in its attempt to recover on the drafts of corporate defendant. A not inconsiderable portion of such expenses have been occasioned by dilatory tactics of appellants-defendants requiring the scheduling of numerous appointments which were broken, the preparation of motion papers and finally the entry of judgment and the initiation of proceedings in several states to levy on said judgments. The reopening of the final judgment entered would occasion the necessity of expending even further substantial sums which would consume additional significant portions of what now appears to be a relatively limited amount of realization.

Argument

SINCE IT WAS CLEARLY WITHIN THE DISCRETION OF THE TRIAL COURT TO REFUSE TO VACATE A JUDGMENT ENTERED PURSUANT TO STIPULATION OF THE PARTIES, THE ORDER OF THE TRIAL COURT MUST BE AFFIRMED.

It is firmly established that the order of the trial court on a motion to vacate a judgment (FRCP 60(b)) should not be disturbed absent an abuse of discretion.

Recently, in Pagan v. American Airlines, Inc., 534 F.2d 990 (1st Cir. 1976), where judgment was entered pursuant to stipulation of settlement, the First Circuit affirmed an order of the trial court, denying a motion to vacate a judgment under FRCP 60(b), summarizing:

> "The principle that a motion to set aside a judgment is addressed to the sound discretion of the trial court and will not be overturned absent an abuse of discretion is firmly established. See Chief Freight Lines Co. v. Local Union No. 886, 514 F.2d 572, 577 (10th Cir. 1975); Hale v. Ralston Purina Co., 432 F.2d 156, 159 (8th Cir. 1970); Hand v. United States, 441 F.2d 529, 531 (5th Cir. 1971); Abel v. Tinsley, 338 F.2d 514 (10th Cir. 1964); cf. Greenspun v. Bogan, 492 F.2d 375, 382 (1st Cir. 1974); Wright & Miller, Federal Practice Procedure; Civil § 2872, at 261."
>
> 534 F.2d at 993

Clearly, there was no abuse of discretion in the instant case where the judgment was similarly premised on a

stipulation between the parties to these proceedings. In the instant case, appellants-defendants consented to entry of judgment unless they appeared on a day certain for depositions.

While FRCP 60(b) is undoubtedly a remedial measure to permit the court to overcome mistakes and procedural defects, it does not confer an open ended right to a party to reopen judgments and avoid finality or certainty in acting upon judgments finally entered.
In order to obtain relief pursuant to FRCP 60(b)(1) a party must affirmatively demonstrate that one of the four conditions for relief pursuant to the FRCP applies. Universal Film Exchanges, Inc. v. Lust, 479 F.2d 573 (4th Cir. 1973).

While the cases have granted relief in a number of instances where there has been a showing of inadvertence in the filing of a document, difficulty on the part of a party in finding counsel, mistaken belief with respect to actions of an attorney by a party or unfamiliarity with formal requirements in an action, (See 7 Moore's Federal Practice §60.22(2) pp. 246-258) such relief has not been granted pursuant to a fact situation even remotely similar to the instant case. Here, there was no mistake, no inadvertence, no surprise and no excusable neglect. As pointed out in Moore's "In the usual case a party having the benefit of counsel will be held to a consent judgment agreed to with full knowledge of all

the facts," 7 Moore's Federal Practice, 252 §6.22(2). See Walling v. Miller, 138 F.2d 629 (8th Cir. 1943), cert. den. 321 U.S. 784 (1944). Absent a showing of reasonable excuse, judgments should stand. Thus in Darlington v. Studebaker-Packard Corp., 261 F.2d 903 (7th Cir. 1959) where plaintiff's attorney failed to appear in response to a notice that dismissal would be entered for failure to prosecute relief pursuant to FRCP 60(b) was refused. See also Quagliano v. United States, 293 F.Supp. 670 (SDNY 1968).

The appellee-plaintiff here attempted on numerous occasions to accommodate appellants-defendants' needs and requirements with respect to discovery. Depositions were repeatedly scheduled, cancelled and rescheduled. Finally, appellee-plaintiff was forced formally to move for a conditional judgment pursuant to FRCP 37 before the trial court. In response to the request for such preclusion order appellants-defendants entered into a stipulation providing for appearance on August 16, 1976 and stating clearly and unambiguously that failure to appear would result in a judgment for appellee-plaintiff and dismissal of appellants-defendants' counterclaims. Said stipulation further provided that the parties could by agreement change the August 16, 1976 date. Appellants-defendants never requested any change. Appellants-defendants' attorney repeatedly confirmed appellants-

defendants appearance. Appellee-plaintiff, in reliance on the agreement and appellants-defendants' counsel's assurances, was available for the deposition with a stenographer. Appellants-defendants failed to appear and neither appellants-defendants nor counsel gave any excuse for such failure except by letter posted in Idaho the day of the examination and arriving after default. Appellants-defendants must be held to their stipulation to the conditional judgment order. Directly in point is Morse Boulger Destructor Company v. Camden Fiber Mills, Inc., 239 F.2d 382 (3rd Cir. 1956) in which the court refused to relieve a party from the provisions of a stipulation since there was no showing that the stipulation was inadvertently, inadvisedly or improvidently entered into or would operate unjustly. See also Allinsmith v. Funke, 421 F.2d 1350 (6th Cir. 1970).

While appellants-defendants may be unhappy that judgment was entered against them because of failure to appear, that result was agreed to by appellants-defendants. "[G]enerally speaking a party who makes an informed choice as to a particular course of action will not be relieved of the consequences when it subsequently develops that the choice was unfortunate," 7 Moore's Federal Practice, 256 §60.22(2). See Sampson v. Sony Corporation of America, 434 F.2d 312 (2nd Cir. 1970); Dal International Trading Co. v. Sword Line, Inc., 286 F.2d 523 (2nd Cir. 1961); Rarick v. United States Steel Workers of America, 202 F.Supp. 902 (WD Pa. 1962). The stipulation

between the parties calling for judgment on default of appellants-defendants was properly filed. Appellants-defendants have no right now to request alteration of said judgment. Robinson v. E.P. Dutton & Co., 45 FRD 360, 12 FR Serv. 2d 60b.33, Case 2 (SDNY 1968). As Chief Judge Van Oosterhut observed in Hoffman v. Celebrezze, 405 F.2d 833 (8th Cir. 1969) a "... reason why the modification of the judgment here is inappropriate lies in the fact that the judgment was entered by consent ... Parties are generally bound by their agreements made in court." 405 F.2d at 836.

Perhaps now appellants-defendants regret their decision to enter into the stipulation. The affirmative tactical decisions of appellants-defendants' counsel whether wise in retrospect or not cannot constitute excusable neglect pursuant to FRCP 60(b). United States v. 1,550.44 Acres of Land, etc., 369 F.Supp. 1078 (D. ND 1974).

The trial court was within its discretion in refusing to vacate the judgment.

Appellants-defendants' argument that their own stipulation should be ignored and that failure to appear for deposition was an immaterial defect is legally insufficient. Such allegation was specifically rejected in Diapulse Corp. of America v. Compagnie National Air France, 17 FR Serv. 2d 1453 (EDNY 1973; not officially reported). The court pointed

out that in the case "the failure to conform to the rules of discovery must result in dismissal even of a claim that may be meritorious". 17 FR Serv. at 1456. Such conclusion is not, in the least, affected by the determination in the recent case of Flaks v. Koegel, 504 F.2d 702 (2nd Cir. 1974) where the basis for default judgment was the failure to answer interrogatories but there was no stipulation consenting to conditional entry of judgment and defendant's failure to reply was attributed in part to the fact that the trial court had granted defendant's counsel leave to withdraw and defendant had been unable to obtain new counsel prior to entry of a preclusion order and judgment. See 504 F.2d at 710-713. The instant case is most different. Here appellants-defendants were represented throughout by counsel. Below, appellants-defendants made no allegation that the stipulation was obtained from appellants-defendants improperly or that appellants-defendants were not fully informed with respect to the terms and implications of such stipulation. There has been no demonstration that appellants-defendants' attorneys were negligent or acted in any way improperly. But even were this to be shown, it would not afford grounds for relief. In re Four Seasons Securities Laws Litigation, 502 F.2d 834 (10th Cir. 1974) cert. den. sub nom, Ohio v. Arthur Anderson & Co., 419 U.S. 1034 (1974); Smith v. Stone, 308 F.2d 15 (9th Cir. 1962).

FRCP 60(b)(1) should not be utilized to avoid finality in litigation. It is not, as demonstrated by the cases cited above, a measure to relieve parties of voluntary agreements or stipulations. It is not a device to vitiate legitimate requirements that parties cooperate with discovery. Were the court to grant appellants-defendants' motion and reopen this proceeding it would make a mockery of discovery rules, the court's respect for the voluntary stipulations or agreements of the parties and of the principle of finality of judgment. Furthermore, to reopen this matter would substantially prejudice appellee-plaintiff in its attempt to realize some recovery on its judgment. Such prejudice to appellee-plaintiff is an additional reason to deny the motion. Lanning v. National Savings and Trust Assn., 2 FRD 149 (D. DC 1941).

On the basis of the stipulation consenting to conditional entry of judgment in the above fact pattern, the trial court was well within its discretion and thus its order must be affirmed. Pagan v. American Airlines, Inc., 534 F.2d 990 (1st Cir. 1976).

Conclusion

Since the judgment entered below is based upon a stipulation, the trial court was well within its discretion

in refusing to vacate said judgment on motion pursuant to FRCP 60(b).

KRAUSE, HIRSCH & GROSS
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41 East 42nd Street
New York, New York 10017
(212) 986-1122

Dated: New York, New York
April 20, 1977

Of Counsel:

Roy H. Carlin

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

The undersigned being duly sworn, deposes and says: Deponent is not a party to the action, is over 18 years of age and resides at Queens, New York.

That on Apr[illegible] 2[illegible] 1977, deponent served the annexed Brief of plaintiff-appellee, Irving Trust Company, on defendants-appellants, AMERICAN TRITICALE, INC., GREGORY SALI and DOROTHY W. SALI, at 5625 Bond Street, Boise, Idaho 83704, the address designated by said defendants-appellants for that purpose by depositing a true copy of same to each of the defendants-appellants, enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Lillian Zawisha
LILLIAN ZAWISHA

Sworn to before me this
20th day of April, 1977

Roy H Carlin
Notary Public

ROY H. CARLIN
Notary Public, State of New York
No. 31-5612040
Qualified in New York County
Commission Expires March 30, 1978